

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between:

Thomas E. Sullivan, Claimant vs. Dain Rauscher Incorporated, Respondent

Case Number: 01-00919

Hearing Site: Seattle, Washington

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**REPRESENTATION OF PARTIES**

For Claimant:

Scott C. Breneman, Esq.  
Breneman Law Firm  
1601 Second Avenue, Suite 1080  
Seattle, WA 98101

For Respondent:

James L. Robart, Esq.  
Lane Powell Spears Lubersky  
1420 Fifth Avenue, Suite 4100  
Seattle, WA 98101-2338

Joan M. Schroeder, Esq.  
Dain Rauscher Incorporated  
V.P. Legal Department  
Dain Rauscher Plaza  
60 South Sixth Street  
Minneapolis, MN 55402

**CASE INFORMATION**

Statement of Claim filed on or about: February 15, 2001

Claimant's Uniform Submission Agreement signed: February 13, 2001

Statement of Answer filed by Respondent Dain Rauscher Incorporated ("Dain Rauscher"), on or about: April 19, 2001

Respondent Dain Rauscher's Uniform Submission Agreement signed: March 26, 2001

Claimant, Thomas E. Sullivan, a former employee of Dain Rauscher, sought arbitration of his claim against Respondent through the NASD Dispute Resolution, Inc. ("NASD-DR") for alleged back wages due Mr. Sullivan, plus punitive damages, attorneys fees, and costs.

Claimant commenced this arbitration on or about February 15, 2001, by filing, through his counsel, Scott Breneman, an arbitration claim dated February 15, 2001. Claimant also filed a submission agreement dated February 13, 2001. Respondent, through its corporate counsel, Joan Schroeder, filed a Uniform Submission Agreement dated March 26, 2001, and its Statement of Answer through its then Seattle counsel, Christian N. Oldham, on April 19, 2001.

A pre-hearing conference was held between the panel and counsel for the parties on October 25, 2001. Subsequent pre-hearing conference calls between the panel Chair, Thomas Loftus, and counsel for the parties were conducted on January 11, 2002, and March 14, 2002. Arguments were heard on March 19-20, 2002, and subsequent exhibits of the parties pertaining to their respective claimed attorneys fees were filed with the panel on March 26, 2002.

### CASE SUMMARY

Claimant, Thomas Sullivan, was employed by Dain Rauscher on May 17, 1995, as a Managing Director in its Corporate Finance Department in Seattle, Washington. During his employment, Mr. Sullivan worked to arrange the private placement of equity investment in "LIFESPEX," a Kirkland, Washington company, specializing in the development of medical testing technology. Claimant alleges Respondent and LIFESPEX executed an engagement letter regarding the private placement. An executed copy of this document was never located or produced. The "draft" copy was introduced as an exhibit.

Mr. Sullivan ended his employment with Respondent, Dain Rauscher, on or about March 31, 1998. A Separation Agreement letter, allegedly prepared by Respondent, was sent to Claimant, and accepted by him, which provided in part as follows:

#### Deals In Progress.

In consideration for past services, you will be entitled to receive a payout of \$75,000 if and when the LIFESPEX transaction closes. Payments due under the terms of this agreement for any M&A or private placement transaction will be made within 10 days following the Company's receipt of the fee. Payment for any public offering will be made upon Financial Settlement of the syndicate account.

Claimant repeatedly requested from Respondent payment of \$75,000 allegedly due him under the Separation Agreement as the LIFESPEX private placement transaction closed on or about April 1999. Claimant claims various theories of recovery against Respondent as follows:

1. Breach of its contract with Mr. Sullivan;

2. Violation of RCW 49.52.050, 070;
3. Quantum Meruit/unjust enrichment;
4. Promissory estoppel; and
5. Failure of Respondent to demand payment and make claim against LIFESPEX for payment.

Respondent admitted Claimant's hiring as an employee in 1995 and his leaving the Company in April 1998. Respondent further admits it was their understanding that a private transaction for LIFESPEX closed in April 1999. Respondent denies it acted as placement agent or in any other capacity with respect to this private placement, and further denies receiving any fee or payment of any kind related to LIFESPEX after April 1998. Respondent denies all allegations and theories of Claimant as to breach of contract.

#### **RELIEF REQUESTED**

Claimant, Thomas Sullivan, requests an award of \$75,000, the principal amount due him under the Separation Agreement, plus prejudgment interest of 12% from March 29, 1999 to March 29, 2002, in the amount of \$27,000. Mr. Sullivan further requests exemplary damages of at least \$75,000 for alleged violation of RCW 49.52.050 and RCW 49.52.070, plus suit costs of \$1,661.10, and reasonable attorneys fees of \$29,703.50.

Respondent requests dismissal of the Claimant's Statement of Claim in its entirety, plus recovery of attorney's fees of \$12,600 and costs of \$377.62.

#### **OTHER ISSUES CONSIDERED AND DECIDED**

A preliminary hearing was held with the panel by telephone conference call on October 25, 2001, to discuss procedural matters incident to the arbitration, including the scheduling of the arbitration hearing. Further preliminary hearings were conducted with the panel Chair on January 11, 2002 and March 14, 2002, involving discovery matters and witness testimony by telephone at the time of hearing.

Respondent's motion at the time of the hearing to exclude certain evidence was denied by the panel.

Claimant's objection to Respondent's referral to possible NASD rule violations by Claimant in closing argument is overruled. The panel allowed reference to the NASD rule in argument only as it may relate to prior evidence presented to the panel. This was not the forum to now allege or bring up any possible NASD rule violations.

During testimony on March 19<sup>th</sup>, the hotel-provided tape recorder failed to function and was replaced in approximately 15 minutes. Counsel for the parties stipulated the proceedings could continue during the interim period.

The motion to exclude Respondent's expert witness, John Kirks, from being present during other testimony of witnesses is denied.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

### **THE ARBITRATION HEARING**

The Chair of the panel convened the arbitration at 9:00 a.m. on March 19, 2002, at the Mayflower Park Hotel in Seattle, Washington. All three members of the panel, namely, panel Chair, Thomas D. Loftus, and Arbitrators, Lisa Schuchman and John Robbins were present in person.

Claimant, Thomas Sullivan, appeared in person and through his counsel, Scott C. Breneman of the Breneman Law Firm, Seattle, Washington. Respondent, Dain Rauscher, appeared through its Seattle counsel, James L. Robart of Lane Powell Spears Lubersky, Seattle, Washington, as well as Joan M. Schroeder, corporate counsel in Minneapolis, Minnesota.

The following witnesses testified at the hearing in person or by conference call on behalf of the party indicated. In all cases, the witness was cross-examined by the opposing party:

Thomas Sullivan	Claimant
David Otto	Claimant
John Kirks	Respondent
Mary Zimmer	Respondent (telephonic)
Steve Jenkins	Respondent (telephonic).

Evidence described on the attached list was admitted by agreement of the parties. Arbitrators Exhibit 1, consisting of the following documents, was admitted:

1. Submission Agreement executed by Claimant, Thomas Sullivan;
2. Submission Agreement executed by Respondent, Dain Rauscher;
3. Claimant's Arbitration Claim dated February 15, 2001;
4. Respondent's Response and Affirmative Defenses dated April 19, 2001;
5. Respondent's Motion Brief on Request to Preclude Evidence Related to Claimant's alleged new theory of relief dated March 14, 2002; and

6. Claimant's Response Brief to Respondent's Motion to Exclude Evidence dated March 18, 2002.

At the conclusion of the hearing, the parties requested time to present written submission as to their attorney's fees and costs. The panel granted the request and the arbitration would be considered closed as of 5:00 p.m. on Tuesday, March 26, 2002. Claimant's and Respondent's respective submissions were received on March 26, 2002, and entered as exhibits.

**AWARD AND FINDINGS**

After considering the pleadings, testimony, and evidence presented at the hearing, as well as post-hearing submissions, having been designated in accordance with the NASD-DR Code of Arbitration Procedures ("the Code") and the submission agreements entered into by the above-named parties, the parties having been duly sworn and the panel having heard the proofs and allegations of the parties, decide in full and final resolution of the issues submitted for determination as follows:

The Claimant, Thomas Sullivan, is awarded, and the Respondent shall pay to the Claimant, the sum of \$75,000.00 as compensatory damages for breach of contract under the terms of the "Separation Letter Agreement" drafted by the Respondent and accepted by the Claimant, plus interest at the rate of twelve percent (12%) per annum from March 29, 1999 to the date of final payment of this award.

The panel found that in the absence of any evidence of a "termination letter" being executed, the engagement letter was never legally terminated. Further, the "DRAFT" of the engagement letter (admitted as Tab 4 in Claimant's Exhibit 1), absent any executed document being presented to the panel, was considered by the panel to be, in effect, the "engagement letter."

The panel further found that the engagement letter between Respondent and LIFESPEX was never legally terminated; that, in fact, the LIFESPEX private placement transaction did close on March 29, 1999; that Claimant was due to be paid the \$75,000.00 amount for prior services rendered under the agreement; that the April 3, 1998, Severance Separation Letter Agreement was a legally binding contract; and that Respondent breached that contract.

The evidence does not support a finding of "willful or intentional" conduct on the part of Respondent as alleged by Claimant. Therefore, Claimant's claim for punitive damages under RCW 49.52.050 and .070 is DENIED.

Claimant's claims under all other theories alleged in his Complaint are DENIED.

Respondent is also liable for and shall pay to Claimant the sum of \$300.00 as reimbursement for Claimant's filing fee.

Respondent is also liable for and shall pay to Claimant the sum of \$29,703.50 in reasonable attorney's fees and shall pay to Claimant the sum of \$191.10 in costs.

Respondent's claim for attorney's fees and costs is DENIED.

All other claims and defenses of the parties, howsoever denominated and by whomever made, submitted to this arbitration panel are DENIED and dismissed with prejudice.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD-DR received or will collect the non-refundable filing fees for each claim as follows:

Initial claim filing fee	= \$300.00
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#### **Member Fees**

Member fees are assessed to each member firm that is either a party in the matter or an employer of a respondent associated person at the time of the events which gave rise to the dispute, claim, or controversy. Accordingly, the member firm, Dain Rauscher, is a party and the following fees are assessed:

Member Surcharge	= \$1,500.00
Pre-Hearing Process Fee	= \$ 600.00
<u>Hearing Process Fee</u>	<u>= \$2,500.00</u>
Total Member Fees	= \$4,600.00

#### **Forum Fees and Assessments**

The Panel assessed a forum fee for each pre-hearing conference or hearing session conducted. A pre-hearing conference and hearing session is any meeting between the parties and the Chair/Panel. The following fees are assessed:

(2) Pre-hearing conferences with a single arbitrator @ \$450.00/session	= \$900.00
Pre-hearing conferences: January 11, 2002	1 session
March 14, 2002	1 session
(1) Pre-hearing conference session with the Panel @ \$1,125/session	= \$1,125.00
Pre-hearing conference: October 25, 2001	1 session

(3) Hearing sessions @ \$1,125.00/session		= \$3,375.00
Hearings:	March 19, 2002	2 sessions
	March 20, 2002	1 session
<b>Total Forum Fees</b>		<b>= \$5,400.00</b>

The Panel assessed the \$5,400.00 in forum fees to Respondent, Dain Rauscher.

**Administrative Costs**

Administrative costs are expenses incurred because a party requested additional services beyond the normal administrative services. These additional services include, but are not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, security, and other requests.

The parties did not incur administrative costs.

**Fee Summary**

1. Claimant is charged with the following fees and costs:

Initial Filing Fee	= \$ 300.00
Administrative Costs	= \$ 0.00
Total Fees	= \$ 300.00
Less payments	= \$(1,425.00)
Refund Due Claimant	= \$(1,125.00)

2. Respondent, Dain Rauscher, is charged with the following fees and costs:

Member Fees	= \$ 4,600.00
Forum Fees	= \$ 5,400.00
Administrative Costs	= \$ 0.00
Total Fees	= \$10,000.00
Less payments	= \$(4,600.00)
Balance Due NASD-DR	= \$ 5,400.00

All balances are payable to NASD Dispute Resolution, Inc. and are payable upon the receipt of the Award pursuant to Rule 10330(g) of the Code.

**ARBITRATION PANEL**

Thomas D. Loftus, JD	-	Public Arbitrator, Presiding Chair
Lisa E. Schuchman, JD	-	Public Arbitrator
John F. Robbins, CFA	-	Non-Public Arbitrator

**Concurring Arbitrators' Signatures**

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Thomas D. Loftus, JD  
Public Arbitrator, Presiding Chair

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Signature Date

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Lisa E. Schuchman, JD  
Public Arbitrator

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Signature Date

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John F. Robbins, CFA  
Non-Public Arbitrator

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Signature Date

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Date of Service

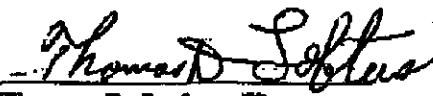


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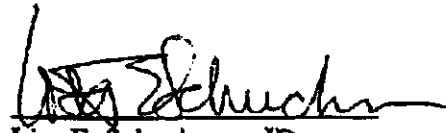
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Lisa E. Schuchman, JD  
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April 22, 2002  
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Signature Date

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John F. Robbins, CFA  
Non-Public Arbitrator

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Signature Date

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Signature Date

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Lisa E. Schuchman, JD  
Public Arbitrator

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Signature Date



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John F. Robbins, CFA  
Non-Public Arbitrator

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4-22-02  
Signature Date



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Date of Service

5-1-02